In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-..... 79-638

LEWIS POE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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October, 1979

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INDEX

Table of Citations

CASES

CONSTITUTION AND STATUTES

MISCELLANEOUS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Lewis Poe, petitioner, prays for a writ of certiorari to review the judgment of the U. S. Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

None. The U. S. District Court for the District of Hawaii rendered judgment without opinion. The Ninth Circuit affirmed without opinion.

JURISDICTION

The judgment of the Court of Appeals (App. C, *infra*, p. A8), was entered on May 14, 1979. A timely petition for rehearing was denied on July 19, 1979 (App. D, *infra*, p. A9).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a wholly sane, innocent, honest, and competent serviceman, after being unlawfully and unconstitutionally arrested and confined in a military psychiatric ward, can be subjected to human drug experimentation by military medical authorities *in the absence of* the serviceman's consent and *in violation of* the Constitution and the Air Force's own regulations.

2. In light of the allegations of the Complaint, which are so far undisputed, whether the courts below denied the plaintiff the due process of law and departed from the accepted and usual course of judicial proceedings when they *assumed* a dispositive question *of fact* without allowing the plaintiff an opportunity to present evidence to rebut said assumption.

3. Whether the Court of Appeals for the Ninth Circuit misconstrued the legal meaning of the *qualifying* phrase "where the injuries arise out of or are in the course of activity incident to service". *Feres v. United States*, 340 U.S. 135, 146 (1950). If so, whether the Court of Appeals misconstrued and misapplied the so-called *Feres* doctrine.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The First Amendment provides, in part:

> Congress shall make no law * * * abridging the freedom of speech, * * * or the right of the people * * * to petition the Government for a redress of grievances.

The Fourth Amendment provides, in part:

> The right of the people to be secure in their persons, * * *, against unreasonable searches and seizures, shall not be violated, * * *.

The Fifth Amendment provides, in part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *.

The Eighth Amendment provides, in part:

> * * *, nor cruel and unusual punishments inflicted.

The Ninth Amendment provides:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Paragraph 4-35 of Air Force Manual 168-4, "Administration of Medical Activities," dated 15 March 1973, provides:

> "*Disposition of Person Who Refuses Professional Care.* A medical board will examine any military member who refuses to submit to medical or dental treatment, surgical operation, or diagnostic procedure. If the person bases his refusal on religious grounds, the hospital commander will arrange for the appointment of

a chaplain as an additional member of the board. The board must decide whether:

a. The patient needs the treatment in order to properly perform his military duties, and

b. The treatment can normally be expected to produce the desired results. When the decision on both points is affirmative, the person will be so advised. If he still refuses, he may be tried by courts-martial. Whether or not disciplinary action is taken, the unit commander may initiate appropriate action, such as discharge, retirement, etc. However, before doing so, he will refer the case to HQ USAF/SGP, Wash DC 20314, for consideration and review.

NOTE: When emergency treatment, surgery, or diagnostic procedure is required to preserve the health or life of the patient, it may be performed with or without his permission. The same is true when a diagnostic procedure or treatment is necessary to protect the health or life of a patient who has been declared by a qualified psychiatrist to be mentally incompetent."

Paragraph 16-2 of Air Force Manual 168-4 (C5), "Administration of Medical Activities," dated 2 October 73, provides, in part:

> "16-2. *Objective.* * * *. The objective of Medical Board evaluation and associated processing is to detect, evaluate, and recommend final disposition of Air Force members whose medical defects preclude performance of worldwide duty, * * *. These actions will be taken as rapidly as is commensurate with sound clinical principles, *the individual's equity and legal rights,* and the Government's interest." (Emphasis added.)

STATEMENT OF THE CASE

On February 15, 1977, former Air Force Captain Lewis Poe filed a Complaint in the U. S. District Court of Hawaii for damages against the United States, pursuant to the Federal Tort Claims Act (FTCA), for personal injury which was *not* incident to Poe's military duty and which was caused by the negligent and wrongful acts of members of the Department of the Air Force. The jurisdiction of the District Court was invoked pursuant to 28 U.S.C. 1346(b).

Poe's injury arose out of trespass and the invasion of privacy. Poe alleged that he was unlawfully and unconstitutionally arrested; that he was unconstitutionally and involuntarily confined in a psychiatric ward; that his injury was sustained during an unlawful and involuntary medical examination of Poe by agents of the defendant United States. See paragraphs 5-23 of Complaint (App. A, *infra,* pp. A2-A4).

On June 13, 1977, the defendant filed a motion to dismiss. On July 27, 1977, in opposing said motion, Poe wrote:

> "A hearing on the merits of this case is required. 'Activity incident to military service' is a question of fact and requires the opportunity of both plaintiff and defendant to offer evidence . . . . because, *at the very least,* the *Feres* Court has *already rejected* the Government's contention that there could be no liability to injured servicemen solely because they were in the Army. See *Feres v. United States,* 340 U.S. 135, 146 (1950)."

On August 1, 1977, a hearing on the defendant's motion to dismiss was held before District Judge Samuel

P. King. Poe contended that his injuries were not sustained in the course of his military duty. After oral argument, Judge King, without affording Poe an opportunity to present evidence to show that his injuries were *not* sustained incident to service, ruled on August 1, 1977:

> "I hold that the Feres doctrine applies. The motion is granted on that basis." Subsequently, Poe asked District Judge King what exactly in the Feres doctrine supports the granting of the defendant's motion. Judge King replied: "No, no, no. I just say Feres applied." [August 1, 1977 Transcript of Proceedings, p. 13.]

In *Feres, supra,* at p. 146, the Supreme Court declared:

> "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."

On August 8, 1977, Poe filed his Motion for Reconsideration, urging the District Court "to reconsider its ruling of August 1, 1977 so as *to allow for a full evidentiary hearing to properly decide* whether Poe was or was not in fact injured 'incident to service'."

On September 2, 1977, the District Court filed its judgment, dismissing the complaint with prejudice.

On September 26, 1977, Poe filed a Notice of Appeal. On page 2 of his Opening Brief to the Ninth Circuit Poe wrote:

> *"Statement of the Issue - - - a Question of Fact*
>
> In light of the allegations in the Complaint, which are so far undisputed, were the alleged injuries which were sustained by the plaintiff 'incident to his military duty/service?' [Absolutely not]."

After briefing by the parties, a hearing was held before the Court of Appeals on May 11, 1979. During said hearing, Circuit Judge James R. Browning queried Poe, resulting in the following exchange:

> JUDGE BROWNING: You were taken into custody under military orders?
>
> POE: Yes, but that (sic) orders were unlawful, your Honor.
>
> BROWNING: Pardon?
>
> POE: Those orders were unlawful; they violated not only the Constitution, but they violated Air Force Regulation 123-11 and Air Force Manual 168-4. So here we come again; they don't even follow their own regulations.
>
> BROWNING: You sued under the Federal Tort Claims Act; that's a particular statute - - - which provides a particular remedy * * *. * * *, the argument is that you're on active duty and as a person on active duty you don't have a cause of action under the Federal Tort Claims Act.
>
> POE: *If,* while on active duty, the injury was sustained incident to service - - - that's what the *Feres* doctrine said.
>
> BROWNING: You were arrested pursuant to an order; even if that order was unlawful, it was certainly incident * * * to the exercise of military authority.[1]

---

1. This presumption by Circuit Judge Browning is clearly untenable. Conduct violative of Air Force regulations *cannot* be an exercise of proper and lawful military authority. Conduct violative of regulations is in clear disregard of the lawful exercise of military authority and a denial of due process, if constitutionally obnoxious. Thus, Poe's arrest, confinement, medical mistreatment were not incident to his service but were certainly incident to the improper and illegal exercise of military authority - - - not to mention the constitutional transgressions which were alleged by Mr. Poe.

During the May 11, 1979 hearing, Circuit Judge Herbert Y. C. Choy queried the defendant, resulting in the following pertinent exchanges:

> JUDGE CHOY: "How did they reason that acted incident to service if it was as the appellant here alleges - - - contrary to regulations, highly unjustified?"
>
> HERWIG: (Attorney for defendant) "As I understand the incident to service test depends mainly on status. Are you on active duty status at the time or are you on furlough status? * * *. It"s only when you're not in active duty status that an injury escapes incident to service. * * *."
>
> JUDGE HUG: "Mr. Poe, you have 4 minutes to respond."
>
> POE: "* * *. And the main argument is, by the Defendant, that if a person is on active duty that means it's incident to service. Now I think that this Court will see a fallacy in this * * *. * * * when Brooks was on furlough,[2] Brooks was on active duty * * *. So if Brooks was on active duty, Brooks recovered under the Federal Tort Claims Act so the argument falls on that one case already. * * *. So the conclusion here, by the Defendant, is, *if* you're on active duty, whatever happens to you, * * *, it's incident to service and that's not what is before this Court. We have to distinguish what it is to be incident to service or not. * * *."

Three days later, on May 14, 1979, the Ninth Circuit affirmed the judgment of the District Court and filed its Memorandum (App. B, *infra*, p. A7), which was replete

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2. Duly authorized furlough is a specifically sanctioned, lawful, in line of duty, military activity. A serviceman on furlough is in an active duty status. This is a well-established fact in the military.

with inaccurate statements. The Court of Appeals cited three cases - - - none of which was in fact "on point." The Court of Appeals implied that it had also "accepted as true the facts alleged by Poe" when in fact it had not. See paragraphs 7-26 of Complaint (App. A, *infra*, pp. A2-A5) and the further discussions hereinbelow.

On May 14, 1979, the Court of Appeals filed its judgment (App. C, *infra*, p. A8), affirming the judgment of the District Court.

On May 29, 1979, Poe filed a timely Petition For Rehearing with suggestion *en banc*.

On July 19, 1979, the Court of Appeals filed its Order (App. D, *infra*, p. A8), denying said petition for rehearing.

REASONS FOR GRANTING THE WRIT

A writ of certiorari should issue because:

1. Mr. Poe was denied the procedural due process of law in the courts below. Moreover, the courts below clearly departed from the traditional and accepted procedures of due process.

Said conflict between the *Brooks-Feres-Brown* rulings of the Supreme Court and today's ruling by the Ninth Circuit is illustrated below.

Original Feres Ruling	*"1979 Feres Ruling" by 9th Circuit*
"We conclude that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Feres, supra,* at p. 146; *in accord, Stencel Aero Engineering Corp. v. United States,* 431 U.S. 666, 671 (1977).	The Government is not liable under the Federal Tort Claims Act for injuries to servicemen *who are in an active duty status.*

Thus, the Court of Appeals has ruled that all servicemen sustaining injury in an active duty status cannot sue the Government under the FTCA *under any and all circumstances.* This is pure nonsense. See *Brooks, supra; Hale v. United States,* 416 F.2d 355, 358 (6 Cir. 1969); and *Mills v. Tucker,* 499 F.2d 866 (9 Cir. 1974). We know this is not true. Servicemen have recovered under the FTCA for injuries not incident to their military duty. Furthermore, if the Court of Appeals really believed its own ruling, then why did it "waste" its time by allowing

Poe to orally argue before it on May 11, 1979. The Court of Appeals could have easily rendered its judgment *on the briefs alone* because Poe had already admitted that he was an Air Force Captain in active federal service at the time of his false arrest and other injuries. On the contrary, the Ninth Circuit *knew and sensed* there was an extraordinary legal controversy brewing.

First, the Brooks brothers recovered under the FTCA in spite of the fact they were both in an active duty status. Their furloughs were lawful, militarily approved and authorized, *active duty* activities. The *Brooks* Court wrote at 337 U.S. 49, 52:

> "But we are dealing with an accident which had nothing to do with the Brooks' army careers, injuries not caused by their service except in the sense that all human events depend upon what has already transpired. Were the accident incident to the Brooks' service, a wholly different case would be presented."

Secondly, the Supreme Court *rejected* the Government's contention that the Government was not liable to the Brooks solely because they were active duty soliders. See *Feres, supra,* at p. 146.

Thirdly, the *Feres* Court recognized that the Tort Claims Act did:

> "contemplate that the Government will sometimes respond for negligence of military personnel, for it defines 'employee of the Government' to include 'members of the military or naval forces of the United States,' * * *." *Feres, supra,* at p. 138.

Fourthly, "The *Feres* decision did not disapprove of the *Brooks* case. It merely distinguished it, holding that the Tort Claims Act does not cover 'injuries to service-

men where the injuries arise out of or are in the course of activity incident to service.'" *Brown, supra,* at p. 112.

Fifthly, the *Brown* Court adhered "to the line drawn in the *Feres* case between injuries that did and injuries that did not arise out of or in the course of military duty." *Brown, supra,* at p. 113.

In further support of this petition, the Ninth Circuit's reasoning collides squarely with Table 12-1, "Proper Claimants Under The Federal Tort Claims Act," of Air Force Manual 112-1, "Claims Manual," dated 1 December 1972. Consider Rules 2 and 3 of said Table 12-1, which are consistent with the *Feres* doctrine.

Rule 2 provides:	*Rule 3 provides*:
"If a claimant is a member of a US Armed Force in active Federal service and damage, injury or death was not incident to his service, then he is a proper claimant (* * *)."	"If a claimant is a member of a US Armed Force in active Federal service and damage, injury or death was incident to his service, then he is not a proper claimant (* * *)."

Using the reasoning of the Ninth Circuit,

Rule 2 would now read:	*Rule 3 would now read*:
If a claimant is a member of a US Armed Force in active Federal service, then he is not a proper claimant.	If a claimant is a member of a US Armed Force in active Federal service, then he is not a proper claimant.

Thus, we see that an absurdity exists, for we cannot now distinguish Rules 2 and 3. Therefore, one's "active duty status" is not the sole controlling and dispositive factor in determining when and what injuries are incident to one's military service. In effect, today's ruling by the

Court of Appeals says that *all injuries* to servicemen who are in an "active duty status" are *automatically* "incident to their service." Nonsense prevails.

Today, the ruling of the Ninth Circuit does not comport with the *Feres* doctrine. Today, the Ninth Circuit has re-written the "Brooks-Feres-Brown" doctrine.

2. A crucial and dispositive issue remains unsettled and unresolved. This Court should authoritatively interpret the legal meaning of the phrase

> "where the injuries arise out of or are in the course of activity incident to service." *Feres, supra,* at 146.

This Court has never construed the legal meaning of said phrase in the context of the *Brooks, Feres,* and *Brown* cases.

Instead of using the opportunity to clarify the "incident to service" test or standard, the Court of Appeals failed in its judicial responsibilities and avoided an important and dispositive issue. Apparently, the courts below are somehow not able to objectively and factually distinguish between what is and what is not "incident to one's service." Thus, this case presents an opportunity for the Supreme Court to finally clarify the law.

3. The Court of Appeals for the Ninth Circuit has rendered a decision in direct conflict with a series of Supreme Court decisions. In short, the Ninth Circuit has rewritten the so-called *Feres* doctrine, which was created and clarified by the line of Supreme Court cases in *Brooks v. United States,* 337 U.S. 49 (1949), *Feres v. United States,* 340 U.S. 135 (1950), and *United States v. Brown,* 348 U.S. 110 (1954).

Because Poe was in an active duty (employment) status, the District Court erroneously and automatically

assumed that Poe's injuries were therefore incident to his military service. No presentation of the facts or evidence was permitted. *The District Court disregarded the presumed truth of the allegations of the Complaint in a light most favorable to Mr. Poe. The Court of Appeals did likewise,* yet it "professed" to accept as true the facts alleged by Poe when in fact it had not. For example, consider the paradoxical conflict (illustrated below) which had confronted the Court of Appeals.

Allegations in Complaint	*Statement by 9th Circuit*
Poe's injuries did not arise out of line of duty nor out of lawful activity incident to his service. (See App. A, *infra,* pp. A1-A6.)	Accepting Poe's allegations as true, we conclude that Poe's alleged injuries were incident to his service. (See App. B, *infra,* p. A7.)

Thus, the Court of Appeals did *not* accept Poe's allegations as true and in a light most favorable to him, but instead *assumed* that a serviceman's "active duty status" was automatically equivalent to "injuries incident to his service." Such an assumption or contention was rejected by the *Feres* Court. This major assumption by the Court of Appeals not only proves far too much but actually re-writes the *Feres* doctrine.

Thus, the Court of Appeals summarily and erroneously concluded that the "facts" were so clear at this stage of the, pleadings, *in the absence of evidentiary hearings,* that Poe's injuries were incident to his service, *"as a matter of law"* (see App. B, *infra,* p. A7) - - - - thereby procedurally by-passing a dispositive question of *fact.* This is a clear departure from the usual and accepted procedures of due process.

4. This civil action is a highly unusual case, involving not only gross constitutional transgressions by

the military but an important *limitation* on the blind application of (or the unwarranted over-extension of) the original *Feres* doctrine. This limitation was created by the *Feres* Court and reaffirmed by the *Brown* Court. In essence, this limitation is epitomized by the following statement.

> We adhere to the line drawn in the *Feres* case between injuries that did and injuries that did not arise out of or in the course of military duty. If the negligent act or acts giving rise to the injury were not incident to the serviceman's lawful duty, or if the serviceman's relationship to his tortfeasor(s) were not analogous to that of a serviceman injured while performing duty under lawful orders or under lawful military obligations, then the *Brooks* case governs, and the Government is liable under the Federal Tort Claims Act.
>
> If this Court decides - - - by its judicial silence or inaction - - - that a wholly sane, innocent, and competent serviceman cannot enforce his basic constitutional guarantees and legal rights through the courts, then all servicemen will be at the mercy or whim of those military authorities who have absolutely no qualm about deliberately abusing their command and/or medical authority to accomplish *unlawful,* peacetime objectives . . . . or to cover up wrongdoing and active misconduct in the military. If this Court decides that a serviceman cannot enforce his basic constitutional rights through the courts, then this Supreme Court may be encouraging not only the erosion of our Constitution but also, in the instant case, the actual human experimentation with drugs upon an unconsenting serviceman.

CONCLUSION

For the reasons and authorities hereinabove stated, the petitioner respectfully requests that this Honorable Court grant this petition for a writ of certiorari.

Respectfully submitted,

LEWIS W. POE
Petitioner Pro Se

October, 1979

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
for the District of Hawaii
Civil No. 77-0049

LEWIS POE,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

COMPLAINT

(Filed February 15, 1977)

COMPLAINT

To the United States District Court for the District of Hawaii:

Plaintiff [herein referred to as "Capt Poe" or "Poe"] alleges as follows:

JURISDICTION

1. This action in tort against the United States for damages is brought pursuant to 28 U.S.C. 1346(b).

2. Most of the acts upon which this complaint is founded occurred within the State of Ohio.

3. Plaintiff resides in Honolulu, is a citizen and resident of State of Hawaii.

4. Plaintiff has exhausted his administrative remedy by having presented his claim to the Claims and Tort

Litigation Div., Hqtrs, USAF, Washington, D. C. 20314. Denial of claim was finalized in writing on August 16, 1976 by the Department of the Air Force, Washington, D.C.

INTRODUCTION

5. This is a tort claim against the United States for money damages for personal and bodily injury caused by the negligent and wrongful acts of federal employees of the Department of the Air Force who were acting under color of federal authority or within the scope of their employment at an operational level of command.

6. Briefly, plaintiff's personal injury arose out of trespass and the invasion of privacy.

7. The personal injury was sustained by Capt Poe in the course of an unlawful and involuntary medical examination of the plaintiff by the defendant United States, by and through members of the hospital staff at Wright-Patterson USAF Medical Center, Ohio, on or about May 31, 1974.

8. Plaintiff's injuries did not stem from lawful military activities. Plaintiff's injuries did not arise out of "line of duty" nor out of "lawful activity incident to military service." There was no activity which involved a lawful military relationship between the plaintiff and the USAF tortfeasors.

9. The defendant is liable under the Federal Tort Claims Act for certain injuries suffered by Poe where the injuries did not arise out of or in the course of military duty.

SUMMARY OF FACTS

10. On May 29, 1974, during his lunch break and while assigned to duty as a Base Computer Systems Operations Officer, Dover AFB, Delaware, USAF Capt Poe was unlawfully and unconstitutionally arrested and frisked by several military policemen.

11. Under duress and coercion, Poe was unlawfully transported across several State boundaries and was unconstitutionally, involuntarily, and totally confined in a "closed" psychiatric ward at Wright-Patterson USAF Medical Center, Ohio, on or about May 31, 1974.

12. From the time of Poe's arrest, the defendant United States, by and through its employees, has *forced* Poe to submit to medical examination against Poe's will and consent, and, moreover, contrary to law and the Air Force's own regulation.

13. While it was within his power, Poe refused to be examined and treated by USAF medical personnel. Poe has never consented to any psychiatric treatment nor has he consented to the *continued* unlawful imprisonment at psychiatric facilities of the United States Government.

14. Poe was never in need of psychiatric examination or care. Poe was never a danger to himself nor to others. Poe was never mentally incompetent.

15. The defendant, by and through its doctors, nurses, corpsmen, and hospital staff at Wright-Patterson Medical Center, unlawfully and negligently examined Poe, negligently prescribed drug treatment for Poe, and wrongfully and forcibly injected drugs into the person of the plaintiff.

16. The defendant further administered drugs by coercion, menace, or duress.

17. Capt Poe was never a patient - - - only an involuntarily confined *resident* in psychiatric facilities which were operated by the government.

18. There was never any doctor-patient relationship between Poe and members of the USAF hospital staff who were involved in performing psychiatric services.

19. Said hospital personnel failed to exercise due care in examining and prescribing a course of drug treatment for the plaintiff.

20. Unlawful confinement and an illegally administered drug regimen continued for several weeks - - - not for the direct benefit of the plaintiff. There was nothing medically, emotionally, nor psychiatrically wrong with the plaintiff. Said regimen was employed as an expedient device by USAF medical personnel to assert their authority over the plaintiff - - - because of his refusal to take one 10-mg pill of Librium.

21. The defendant *voluntarily assumed* a duty to forcibly *and* illegally examine and treat the plaintiff, without medical cause and contrary to Air Force regulation.

22. The defendant assumed the obligation to provide only care which was free from negligence to meet the actual medical needs, if any, of the plaintiff and only after a proper and lawful examination.

23. The defendant breached that duty by carelessly, wrongfully performing it.

24. In June of 1974, USAF hospital personnel, in their failure to exercise due care, took it upon themselves to *force* drug treatment upon Poe for no medically justifiable reason, in the absence of Poe's consent, in disregard of Poe's protest, and in violation of Air Force Manual 168-4, "Administration of Medical Activities."

25. In June of 1974, Poe refused to take any drugs. Thereafter, 3 male nurses/corpsmen attempted to inject Poe with 50-mg of Thorazine. In Poe's attempt to avoid the hypodermic needle, a struggle ensued. Poe was subdued; Poe was injected; Poe's neck was injured. Poe was again in a "chemical straight-jacket."

26. Poe was terrified. His personal health and safety became his primary and immediate concern.

27. On August 30, 1974, Capt Poe was admitted to a psycho ward, Veterans Administration Hospital, Palo Alto, CA. Here, he received *proper care,* namely, no medical care at all. On Sept. 6, 1974, Poe was released from said VA Hospital.

COUNT ONE

28. The acts of USAF doctors, nurses, and/or corpsmen at Wright-Patterson Medical Center, including but not necessarily limited to the allegations set out hereinabove, constitute a trespass and invasion of plaintiff's indefeasible right to privacy, personal security, and personal liberty.

COUNT TWO

29. The tortious acts of doctors, nurses, and/or corpsmen at Wright-Patterson, including but not necessarily limited to the allegations set out above, constitute a failure to exercise due care and a failure to act responsibly and professionally in the examination of, in the diagnosing of, and in providing proper care to meet the actual medical needs of the plaintiff.

SOME INJURIES TO PLAINTIFF

30. As a direct and proximate result of tortious, negligent, and wrongful acts of employees of the United States

Air Force, who were acting within the scope of their employment, the plaintiff has suffered, among other things, (a) injury to his neck and person, including pain, mental distress, humiliation, frustration, fear, and protracted confinement in a psycho ward, (b) deprivation of his right to privacy, bodily integrity, security, and safety, the enjoyment of life and liberty, freedom against unreasonable and unlawful seizure, freedom of association, (c) deprivation of his right to refuse negligent, wrongful, and illegal treatment, (d) deprivation of his right to be advised if the hospital proposes to engage in human experimentation and his refusal of same, (e) deprivation of his dignity as a human being.

PRAYER FOR RELIEF

WHEREFORE, the plaintiff prays:

(1) for judgment against the United States of America in the sum of $1,547.00 in special damages and $2,000,000.00 in compensatory damages;

(2) for his costs, legal consultation fees, attorneys' fees and services, if any, incurred herein; and

(3) for such equitable or other relief as may be just, necessary, and proper.

DATED: February 15, 1977,
Honolulu, Hawaii.

Respectfully,

/s/ Lewis W. Poe
Lewis W. Poe Plaintiff
3853-C Keanu St.,
Honolulu, HI 96816

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Ninth Circuit
No. 77-3537

LEWIS POE,
Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA,
Defendant-Appellee.

On Appeal from the United States District Court
for the District of Hawaii

MEMORANDUM

(Filed May 14, 1979)

Before: BROWNING, CHOY, and HUG, Circuit Judges.

The dismissal of Poe's complaint is affirmed. The district court properly determined that, accepting as true the facts alleged by Poe, the alleged injuries about which Poe complains were, as a matter of law, "incident to service" in the military; thus his claim is barred by the doctrine of *Feres v. United States,* 340 U.S. 135, 146 (1950). *See Henninger v. United States,* 473 F.2d 814 (9th Cir.), *cert. denied,* 414 U.S. 819 (1973); *Misko v. United States,* 453 F. Supp. 513 (D.D.C. 1978).

AFFIRMED.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Ninth Circuit
No. 77-3537
DC#CV 77-0049 SPK

LEWIS POE,
Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA,
Defendant-Appellee.

JUDGMENT

(Filed August 9, 1979)

APPEAL from the United States District Court for the District of HAWAII.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of HAWAII and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is Affirmed.

Filed and entered May 14, 1979

APPENDIX D

UNITED STATES COURT OF APPEALS
For the Ninth Circuit
No. 77-3537

LEWIS POE,
Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA,
Defendant-Appellee.

ORDER

(Filed July 19, 1979)

Before: BROWNING, CHOY and HUG, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has voted to grant rehearing en banc. F.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

No. 79-638

In the Supreme Court of the United States

OCTOBER TERM, 1979

LEWIS POE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-638

LEWIS POE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner commenced this action under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.*, seeking damages from the United States for injuries allegedly incurred when he was detained and subjected to an involuntary psychiatric examination by military personnel. At the time of the acts alleged, petitioner was on active duty as an Air Force officer.[1] The United States District Court for the District of Hawaii dismissed the complaint, and the court of appeals affirmed (Pet. App. A7). Both courts relied on *Feres* v. *United States*, 340

[1]The complaint alleged that petitioner, "while assigned to duty as a Base Computer Systems Operations Officer, Dover AFB, Delaware," was arrested by several military policemen during his lunch break and transported to a "psychiatric ward at Wright-Patterson USAF Medical Center, Ohio," where he was subjected to examinations without his consent and negligent medical treatment (Pet. App. A3).

U.S. 135 (1950), which held that servicemen cannot recover against the United States, under the Federal Tort Claims Act, for injuries "incident to [their military] service" (*id.* at 146).

The decision of the court of appeals is correct, and petitioner presents no question meriting this Court's review. Petitioner's primary argument here (see Pet. 10, 12, 13, 14) is that the lower courts misinterpreted *Feres* by extending it to any tort involving a serviceman on active duty—a result that petitioner claims is inconsistent with *Brooks* v. *United States*, 337 U.S. 49 (1949), which permitted a claim by an active duty serviceman who was on furlough at the time of his injury.

This argument simply misreads the court of appeals' opinion. That opinion upheld the dismissal of petitioner's complaint because the alleged injuries were " 'incident to service' in the military * * *" (Pet. App. A7, quoting *Feres* v. *United States*, *supra*, 340 U.S. at 146). Nothing in the court of appeals' decision supports petitioner's claim that the affirmance was based merely on his active duty status. Petitioner, unlike *Brooks*, was not on furlough. Thus, the court of appeals correctly applied settled law to the particular facts of this case.[2]

Petitioner's further argument that *Feres* is not applicable here because his injury resulted from allegedly illegal military action (see Pet. 7 n.1) is incorrect. *Feres* and its companion cases determined whether the injuries were incident to military service by looking to the status of the injured servicemen, and stated that "[t]he common fact underlying the three cases is that each claimant, while on active duty and not on furlough, sustained

[2]This Court recently re-examined and upheld the *Feres* doctrine, in a somewhat different context, in *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666 (1977).

injury * * *." 340 U.S. at 138. One of the cases involved a barracks fire that killed an active duty serviceman; the second and third involved malpractice during surgery on active duty servicemen (340 U.S. at 137).

Most claims of negligence or intentional misconduct by military officials will probably involve some alleged breach of a regulation, but that is immaterial under the rationale of *Feres*. The result in *Feres* and its companion cases would have been no different had there been a regulation prohibiting faulty furnaces or a regulation prohibiting doctors from leaving towels in the stomachs of surgical patients. The question is not whether the allegedly tortious conduct involved a violation of regulations, but whether the injuries alleged to have resulted were "incident to service." The court of appeals correctly held that petitioner's allegations were barred by *Feres*.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.[3]

WADE H. MCCREE, JR.
Solicitor General

DECEMBER 1979

[3]Petitioner raised essentially the same claims in an earlier suit, which was dismissed by the district court. The dismissal was affirmed by the court of appeals, and this Court denied certiorari. *Poe* v. *United States*, 577 F. 2d 752 (9th Cir.), cert denied, 439 U.S. 1047 (1978). Petitioner's present suit is, in our view, barred by the doctrine of res judicata, but for reasons that are not entirely clear the United States did not raise that defense in the district court. We did raise the matter in a supplemental brief in the court of appeals, but the court, as noted, affirmed the district court's decision on the merits.

DOJ-1978-12

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-638

LEWIS POE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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December, 1979

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PETITIONER'S REPLY MEMORANDUM

Reference footnote 1 on page 1 of the "Memorandum For The United States In Opposition" (hereafter "Gov't Opp. Memo").

The Respondent (hereafter "Solicitor General") has incorrectly paraphrased the allegations (Pet. App. A3) of the Complaint. Petitioner Poe, while in active military service, was not simply "arrested" and "transported to" a psychiatric ward where he was "subjected to examinations" without his consent. Poe was *unlawfully* and *unconstitutionally* arrested (Pet. App. A3). Poe was *unlawfully* transported and was *unconstitutionally, involuntarily,* and *totally confined* in a psycho ward (Pet. App. A3). Poe was never in need of psychiatric examination or care. The defendant unlawfully and negligently examined Poe and *wrongfully* and *forcibly* injected drugs into the person of Poe. The defendant administered drugs by coercion (Pet.

App. A3).[1] Additionally, please note that the Solicitor General did *not* factually challenge the "Statement of the Case" (Pet. 5-9).

Reference Gov't Opp. Memo 2.

The lower courts misconstrued and/or disregarded the *qualifying phrase* "where the injuries arise out of or are in the course of activity incident to service." The meaning of this phrase must first be definitively clarified, and, second, this clarification must be consistently applied to the factual circumstances of each case. Since "incident to service" is a question of fact, all of the facts must be judiciously considered. Thus, Poe is entitled to an opportunity to present evidence to show that his injuries were not incident to his service.

The Solicitor General admitted that a serviceman (Brooks) on furlough at the time of his injury was an *active duty* serviceman. Thus we see that being an active duty serviceman does not automatically bar recovery under the Federal Tort Claims Act. *Hypothetically,* if Poe had been arrested while on pass or furlough and if the same sequence of events had transpired, would the Solicitor General now argue that Poe's injuries were not incident to his service? What if Poe was arrested without probable cause on a military base while he was on a 3-day pass or furlough?

Poe could not possibly misread the court of appeals' *opinion* because there was no opinion. The Solicitor General wrote:

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1. Apparently, military authorities administer drugs forcibly and illegally to unconsenting servicemen without any qualms or hesitation, and with apparent impunity. The Supreme Court has done nothing to correct this shocking military abuse. The military has been guilty of heinous acts against its own personnel. See *Thornwell v. United States,* 471 F. Supp. 344 (D.C.D.C. 1979).

> "That opinion (sic) upheld the dismissal of petitioner's complaint because the alleged injuries were ' "incident to service" * * *'."

Fortunately, the Solicitor General raises the same issue as does Poe. *On what factual basis* was it determined that Poe's injuries were incident to his military service? (See Pet. 2, 5-8; Pet. App. A1-A6). Was it because Poe "was on active duty as an Air Force officer"? (See Gov't Opp. Memo 1; Pet. 13-14).

The Solicitor General correctly wrote:

> "Nothing in the court of appeals decision (sic) supports petitioner's claim that the affirmance was based merely on his active duty status."

Indeed, nothing in the court of appeals' *memorandum* (Pet. App. A7) supports a contrary proposition either, because said memorandum is simply a factually impoverished, unfounded, and unsupported "declaration" by a 3-judge panel of the Ninth Circuit. In the Record on Appeal (August 1, 1977 Transcript of Proceedings, pp. 8 and 10), we find the following relevant passages:

> p. 8: "THE COURT: Very well. I disagree with Mr. Poe and I think that the Feres case does say that, if you're a soldier on active duty, you can't recover;"
>
> p. 10: "THE COURT: * * *. When you join the military you can't sue the United States Government for anything they do to you when you're on active duty status."

Now re-read the exchange between Chief Judge Browning and Poe on Pet. 7.

The Solicitor General vaguely wrote that the court of appeals correctly applied settled law to the particular

facts. Precisely what *"settled law"* is the Solicitor General referring to? This case proves that the "law" is not quite settled. In fact, since there are no opinions below, how can we be sure what law or principles of law were applied?

Petitioner, like *Brooks,* was an active duty serviceman; however, unlike Poe, *Brooks* was not unlawfully arrested and confined in a psycho ward and forcibly injected with drugs without medical cause therefor. This Court does not or may not know why Poe was arrested and confined. The opinionless rulings of the lower courts have not helped at all in this matter.

Reference Gov's Opp. Memo 2-3.

According to the Solicitor General, *Feres* and its companion cases looked to the "status" of the injured serviceman. What status? What kind of status? Is a particular type of status dispositive of the "incident to service" test?

According to the Solicitor General, a breach of a regulation is immaterial under the rationale of *Feres.* Nonsense. First, the Solicitor General probably does not know what the *original* "rationale of *Feres*" was. Second, the *Feres* holding was rendered under circumstances where there was no breach of regulations. Hence, the Solicitor General's assertion is a *non sequitur.* Moreover, a serviceman perished by fire in his military quarters, which he accepted as his reasonable home. A second serviceman *consented* to an abdominal operation. A third serviceman *consented* to medical treatment by army surgeons which resulted in his death. These servicemen accepted quarters and consented to medical treatment. The barracks fire was not deliberately set. Army doctors did not force treatment on nonconsenting patients. These patients could have

selected civilian doctors. These servicemen had a reasonable freedom of choice which Poe did not have in relation to Poe's arrest and forced injections. A serviceman who drives a truck or flies an airplane knows that no machine is perfect. Likewise, no building is perfect. No surgeon is infallible. There was no breach of regulations nor violation of the Bill of Rights in the *Feres, Jefferson,* and *Griggs* cases. Third, let's assume there were regulations prohibiting faulty furnaces, prohibiting doctors from leaving towels in the stomachs of surgical patients, and prohibiting the forcible or surreptitious, nonconsensual administration of psychotropic drugs to servicemen. Let's further assume that commanders or doctors, *knowingly, maliciously,* and/or *in reckless disregard* of said regulations, assigned quarters to servicemen with faulty furnaces, left towels in patients' stomachs, and forcibly injected psychotropic drugs into patients without their consent. Now, the Solicitor General further asserts (Gov't Opp. Memo 3):

> "The result in *Feres* and its companion cases would have been no different * * *."

Poe doubts very much that the *Brooks* or *Feres* or *Brown* Court would go so far as to declare that the forcible injection of or the surreptitious administration of psychotropic or psychedelic drugs to unconsenting servicemen would be "incident to their service" under these circumstances.

The Solicitor General correctly stated that the question is whether the injuries alleged to have resulted were incident to service. However, in making that determination, a court of law must consider all the circumstances as they reasonably appeared at the time. Therefore, alleged breaches of regulations and constitutional transgressions

are relevant and material to such an inquiry and determination.

Reference Gov't Opp. Memo 3, n. 3.

Poe did *not* raise essentially the same claims in an earlier suit which was dismissed by the District Court of Hawaii (No. 76-0392). In that earlier suit, Poe sued the United States pursuant to Section 2 of P.L. 93-253, 88 Stat. 50 (see 28 U.S.C. 2680(h), as amended March 16, 1974). That was a tort claim for personal injury arising out of assault, false arrest and imprisonment, and the abuse of process, caused by the wrongful acts *of Air Force investigative or law enforcement officers.* The District Court, in dismissing that suit before an answer was filed and without receiving any evidence at all, stated during the February 4, 1977 hearing:

> "* * * and I'm not at all confident that I know what the law is right now, * * *. But, in the absence of some teaching from my superiors in the appellate divisions, it appears to me that this case is governed by Feres and Gamage, and I'll grant the motion to dismiss."

Subsequently, the District Court rendered judgment *without opinion*; the Court of Appeals affirmed *without opinion* (CA No. 77-1956). Attorney Brook Hart of Honolulu petitioned for certiorari (No. 78-589). This Court denied certiorari. Thus, as of today, there is no published opinion on the scope, meaning, and applicability of Section 2 of P.L. 93-253 although the purpose of said Congressional enactment was "to provide a remedy against the United States for the intentional torts of its investigative and law enforcement officers" and "to make the Government independently liable in damages for the same type of con-

duct that is alleged to have occurred in *Bivens* (and for which that case imposes liability upon the individual Government officials involved)."[2]

Clearly then, Poe's *present* suit is not barred by the doctrine of res judicata.

Finally, the court of appeals did not in any real sense affirm the district court's decision "on the merits" because the so-called "merits judgment" of the district court was based on an *assumed* dispositive question of fact, without permitting Poe an opportunity to present evidence to rebut the *erroneous assumption* that being in an active duty status was automatically tantamount to "sustaining injuries incident to one's service." Contrary to the Solicitor General's claim, there was no "merits judgment" in the district court.

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Petitioner Pro Se

December, 1979

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2. Senate Report No. 93-588, 93rd Cong., 2d Sess., 1974, U.S. Code Cong. & Adm. News, pp. 2789-2792. Also, *Norton v. United States,* 581 F.2d 390, 395 (4 Cir. 1978).